



The Directive 95/46/EC :

Ten years after

Y. POULLET
Prof. at the Univ. of Namur and Liege
Dean of the Faculty of Law of Namur
Director of the CRID
yves.poullet@fundp.ac.be
<http://www.droit.fundp.ac.be/crid>

International Conference on Privacy Montreux, Sept. 14-15, 2005



Table of content :

1. 10 years after : Where is the harmonization ?
2. 10 years after: Are the D.P. Directive effective ?
3. The TBDF issues : the Directive facing a global world
4. Towards a « techno-legal » approach : The machine is the problem – The solution is in the machine



5. Conflicts of values : Privacy a value amongst other ones

6. Two new legal Instruments : a dubble shift

- *The EU Charter on Human Rights : From Privacy towards Data Protection*
- *The Directive 2002/58/CE : Beyond the D.P. Directive*



1. 10 years after : Where is the promized harmonization ?

- *The 2003 Report from the Commission (only 15 M.S.) :*

"In the course of the consultations conducted, few contributors explicitly advocated the modification of the Directive. The most notable exception was the detailed proposals for amendments submitted jointly by Austria, Sweden, Finland and the UK. These proposals for amendments concerned only a small number of provisions (notably Article 4 which determines the applicable law, Article 8 on sensitive data, Article 12 on the right of access, Article 18 on notification and Articles 25 and 26 on transfers to third countries), leaving most of the provisions and all of the principles of the Directive untouched. The Netherlands adhered to these proposals at a later stage."

A global satisfaction **but** major discrepancies do exist :

- Definitions (e.g. the notion of personal data, the list of sensitive data)
- Applicable law
- Compatibility Principle
- Right of access



- The Commission's initiatives !!: A « cooperative » approach

The three actions proposal by the report

- Discussion with M.S. and DP authorities
- Association of the candidate countries
- Improving the notification of all legal acts transposing the Directive

- « The Commission will use its formal powers under art. 226 of the Treaty if this cooperative approach fails to produce the necessary results »



2. Is the D.P. Directive effective ?

2.1. Privacy is not a real concern for consumers and business companies' The Eurobarometers (2003)

* As regards the Data subjects

- Greater sensitivity (25% - very concerned) but depends from a country to another one
- ... but no awareness about their rights (68%), the existence of DP authorities (68%) and the availability of PETS (72%)



* As regards the D. controllers

- « No objection as such as regards the DP constraints but the present patchwork of varying and overlapping requirements as regards informations that controllers have to provide to D.S. is unnecessarily burdensome for econ. Operators without adding to the level of protection. »



FURTHERMORE

*. Lack of knowledge of the legislation (40%)
Big differences between countries*

*. Risk being caught is low (30%)
See the Art 29 WG document on enforcement
actions carried out by DPA (Jan. 2005)*

. No complaints from the consumer (67%)

=> The « vicious » circle



2.2. The increasing role of art. 29 W. Group

(See Strategy Document 29/09/04)

- Multiplication of opinions, resolutions and recommendations
- Creation of subgroups
- Increasing cooperations between D.P. authorities when an unique loket
- No sufficient visibility v. à v. the Press
- Good cooperation with the Parliament ... less with the European Council
- Clear Strategy with annual programme



2.3. How to find new alliances ?

- With Trade labour associations (see the EU Framework agreement on tele-working July 2002)*
- With civil liberties associations (EDRI)*
- With consumer Protection associations*
- With companies : the role of DP officers (Opinion 18-01-05).*

New Jobs on the market (Infomediaries and auditing companies)

Multiplications of Online consultations by DPA and Art. 29 W.G.

(recently on Privacy and IPR, RFID, Video surveillance)



2.4. Selfregulation remains a Myth ? Even if clearly encouraged by the Commission

- Two codes of conduct at the EU level ? (IATA/FEDMA/Head Hunters)
- National disparities (the NL/Italy/DK)
Self regulation or coregulation
- The International Dimension:
 - The U.S. Safe Harbor System as a counter-model
 - The « Binding Corporate Rules » approach



2.5. When the E.U. Judges intervene !

- The Osterreichischer Rundfunk (May 20, 2003)
e.a. and Linqvist (Nov. 6, 2003) cases

-> The DP Directive is to be applied as a rule,
whereas its non application is forming a more
exception of strict application

Application of the EU Directive

- to all public administration processing
(except 3d pillar)
- to all Internet Web pages (including blogs,
etc)



3. The TBDF issues

- * « Access », » Transfer », « Make use of the equipment » : concepts still to be defined
- * Adequate Protection : a very limited « White list » - A priori or a posteriori control ?
- * Multiplication of « instruments »
An adequate answer to the WTO requirements
 - Commission's decisions based on art. 25;
 - « Three » Model contracts for the transfer of Personal data to « Third countries »;
 - The « Binding Corporate Rules » proposed by the art. 29 W.G.

The need for a more structured approach

4. Towards a « Techno legal » approach: the « security Principle »



** The PETS Promotion !*

- « The machine is the problem ...
The answer is in the machine »
- PETS or PITS (Bygraeve): The P3P system
- Towards a new principle : The obligation
to develop ICT products complying with
Privacy Requirements :
Recommendation 1/99 Feb., 23 1999
A concrete example : The RFID Case
(29 WG – Opinion 19.01.2005)
- **The active role of the E.U.Commission (Pisa
Project)**



- The debate on Standardization (the 26th Int. Conf. On Privacy and Personal data Prot. (Wroclaw, 14 sept. 2004) Resolution on a draft ISO Privacy standards) :

« Whereas the Int. Conf. wishes to support the development of an effective and universally accepted international privacy technology standard and make available to ISO its expertise for the development of such standard... »

What's about ICANN, W3C, IETF...?



5. Conflicts of Values

* *Freedom of Expression v. Privacy*

- From Case to the need to balance
Freedom of Information Act v. Privacy
Act (Opinion 7/2003 Act. 29 WG)

* *Public Security v. Privacy*

From Echelon Case : 5th Sept. 2001
TO Traffic Data Retention and PNR debates

Q : 3d or 1st Pillar ?

Parliament v. Council of Ministers

The little big brothers : from black lists to...



* *General Interest v. Privacy : E. Government : big brother or ...*

+ New tools (Official e. signature, Identity Cards, Referential Data bases, ...)

+ New uses
From the traditional doctrine of « separate aggregates » to a network with multiple re-use)

+ Solutions : Technical and/or organizational solutions



6. Two new legal Instruments – A double Shift

** The art. 8 of the EU Com. on Human Rights : From Privacy Towards D.P.*

- The 1950 negative approach focusing on Privacy

*- The 1995 and 2000 positive approach :
+ Subjective Rights as away to ensure self determination in an I. Society*

+ A balanced approach between different liberties placed on the same footing

+ The unique role of the DPA



* *The Directive 2002/58/EC : Beyond the DP Directive*

*Between D.S. and D.C., a third Party : the
Technology : The Lack of mastership*

- Are we still speaking about Personal Data ?
- New actors to be regulated
- The Terminal equipment as a new object to be regulated

Conclusions



- Happy Birthday